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July 3, 1996

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VIA FEDERAL EXPRESS

Acting Secretary  
William F. Caton  
Federal Communications Commission  
1919 M Street N.W., Room 222  
Washington, D.C. 20554

RECEIVED  
JUL 05 1996  
FCC TELECOM

Re: CS Docket No. 96-46; In the matter of Implementation of  
Section 302 of the Telecommunications Act of 1996; Open  
Video Systems

Dear Mr. Caton:

Enclosed for filing, please find the original and twelve (12) copies of the above-entitled  
Petition for Reconsideration. Please file-stamp the twelfth copy and return to me in the enclosed  
stamped, self-addressed envelope.

Thank you for your assistance. Please call me at the above number if you have any  
questions regarding this filing.

Sincerely,

  
Georgia N. Crump

GNC/jmc  
1107000-090.LTR

Enclosures

cc: George White

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JUL 05 1996

CS DOCKET NO. 96-46

FCC MAIL ROOM

IN THE MATTER OF IMPLEMENTATION §  
OF SECTION 302 OF THE §  
TELECOMMUNICATIONS ACT OF 1996; §  
OPEN VIDEO SYSTEMS §

BEFORE THE  
FEDERAL  
COMMUNICATIONS  
COMMISSION

PETITION FOR RECONSIDERATION

NOW COMES Municipal Administrative Services, Inc. ("MAS"), a Texas corporation, David M. Griffith & Associates ("DMG"), and Lloyd, Gosselink, Fowler, Blevins & Mathews, P.C., (hereinafter collectively referred to as "Petitioners"), on behalf of themselves and the municipalities and franchising authorities they represent, and present this Petition for Reconsideration to the Commission, requesting the Commission to reconsider its Second Report and Order and the adoption of rules pertaining to Open Video Systems in the above docket. In support hereof, Petitioners show the following:

Compliance with 47 C.F.R. § 1.429

1. Public notice of the Commission's Second Report and Order adopted on May 31, 1996, adopting the Open Video System ("OVS") rules, was provided on June 5, 1996, at 61 Fed. Reg. 2869. Therefore, this Petition is timely filed in accordance with 47 C.F.R. § 1.429.

Identification of Petitioners

2. MAS and DMG are consulting firms employed by municipalities throughout the United States to assist these municipalities in a number of matters pertaining to telecommunications franchises and management of public rights-of-way, including the negotiation of franchises with

telecommunications service providers. Lloyd, Gosselink, Fowler, Blevins & Mathews, P.C. is a law firm that represents municipalities with regard to telecommunications franchise issues.

### Identification of Issues

3. Petitioners believe that the impact of the OVS rules on Local Exchange Carriers and telephone franchises of municipalities has not been completely understood by the Commission. Although the text of the Report and Order deals at great length with the impact of OVS on cable television franchises and providers, the Commission's rules are either silent or misleading regarding the obligations of a telecommunications provider that undertakes to provide cable television services through an OVS.

4. Petitioners believe that municipalities must receive notice of OVS certification requests simultaneously with such notice being provided to the Commission, in order for local governments, whose rights-of-way will be encumbered by such OVS systems, to have a meaningful opportunity to comment upon such certifications.

### Franchise Requirements for OVS

5. Municipalities throughout the country are continually dealing with issues related to the use of the public rights-of-way by providers of all manner and type of communications services, as well as by other utilities. As a part of their on-going efforts to effectively manage these public assets, municipalities often require *any* and *all* users of the rights-of-way to obtain authorization from the municipality for such use and occupation. This authorization takes many forms, and includes franchises and permits, as well as contractual agreements.

6. Municipalities in a majority of states have existing franchises with their Local Exchange Carrier ("LEC"), pursuant to state laws that require the telephone company to obtain

either approval and/or authorization from the municipality prior to using the public rights-of-way within the municipality for the provision of local telephone service. Thus, Southwestern Bell Telephone, GTE, US West, BellSouth, and other regional Bell operating companies have already entered into franchise agreements with local governments that govern the use of such rights-of-way for the provision of telephone services.

7. The conditions under which local exchange carriers ("LEC") occupy public rights-of-way are spelled out in franchises or other similar types of ordinances adopted by local franchising authorities. These franchises impose conditions for the coordination of construction schedules, the establishment of standards and procedures for construction of facilities, the provision of insurance and indemnity requirements, repair and reconstruction of disturbed rights-of-way, and similar provisions affecting the public health, safety, and welfare. These franchises also often require that compensation be provided to the municipality for the LEC's use of the public rights-of-way.

8. Many municipalities are in the process of renegotiating their franchises with the LEC's as existing franchises are expiring, and also as new providers are entering the marketplace. In many instances the LEC's are refusing to include any provisions regarding OVS in the telephone franchise. Therefore, because the OVS provisions do not require a cable television franchise, and the LEC's are refusing to include such provisions in the telephone franchise, the OVS provisions are falling into a "no man's land" between the two types of franchises. However, municipalities need to have a method to assert their authority regarding the provision of public, educational, and governmental ("PEG") access by the OVS provider, and the municipalities need to have a mechanism to actually impose the fees in lieu of cable franchise fees. Both of these provisions

clearly should fit within the telephone franchise, and there is no need to have a third ordinance to deal with these issues.

9. The recent action by the Commission in adopting its rules for OVS providers fails to take into account the effect of the new OVS services on existing and future telecommunications franchises and ordinances of municipalities, and leaves unclear the manner in which franchising authorities will be able to continue to manage the use of rights-of-way by entities providing multiple services, such as telecommunications and cable television through OVS.

10. Now that LEC's will be able to offer cable television services through the OVS vehicle, their use of the rights-of-way for such purpose should be subject to the same conditions as their use of the rights-of-way for local exchange telephone purposes. Because of Petitioners' experience in negotiating telecommunications franchises with the LEC's, however, it has become clear that the Commission needs to address the issue of how the OVS rules impact telephone franchises and the ability of municipalities to assert their authority over the rights-of-way and the OVS provider in accordance with the 1996 Act. Petitioners are, therefore, seeking a reconsideration and a clarification from the Commission regarding the manner in which the OVS provider's use of the rights-of-way may be managed by the local government.

11. Section 253(c) of the 1996 Act leaves unaltered the authority of municipalities to manage the public rights-of-way, and to receive reasonable compensation for the use of same. Section 653(c)(2)(B) of the Act also recognizes the authority of local governments to assess fees in lieu of cable franchise fees upon entities using the public rights-of-way to provide cable television services through an OVS. Section 76.1511 of the Commission's rules, however, does nothing more than repeat the statutory language that OVS providers "may" be subject to payment

of fees on their Gross Revenues for the provision of cable services imposed by a franchising authority in lieu of cable franchise fees.

12. Some municipalities that have recently concluded negotiations with the LEC's for new telephone franchises have attempted to address the eventuality of the LEC providing new video services. Attached hereto as Exhibits "A," "B," and "C" are ordinances that acknowledge that the telephone companies may, in the future, be authorized to provide video programming services, and require such companies to obtain the necessary approvals from the municipality before providing such services.

13. Municipalities currently negotiating new franchises with existing LEC's have attempted to include the PEG access requirements and the OVS fees in lieu of franchise fees within the requirements of the telecommunications franchise. As an example, language that municipalities have attempted to include within telecommunications franchises is as follows:

If Grantee seeks certification from the FCC to provide cable television service through an Open Video System, Grantee must notify the City when it files for certification with the FCC, and upon receipt of certification must modify its Franchise to provide for: (i) the payment of fees in lieu of franchise fees for the occupation of Rights-of-Way and Public Property for the purpose of operating an Open Video System; (ii) the provision of public, educational, and governmental access on such Open Video System; and (iii) such other provisions as may be required by the FCC or the City.

14. To the extent that the Commission's Order implies or affirmatively states that LEC's may avoid the franchise requirements of local governments for the provision of cable television services through OVS, requirements that LEC's have otherwise agreed to with regard to the provision of local exchange telephone service, Petitioners request that the Commission either reconsider its Order or issue a clarification that it is the intent of both the Congress and the Commission that LEC's using public rights-of-way to provide cable television services through

an OVS remain subject to pre-existing, and otherwise valid, franchise requirements of local governments, and such OVS requirements are consistent with and compatible with the telephone franchise.

#### Notice to Municipalities

15. Additionally, LEC's have also balked at providing notice to the municipalities when they seek certification from the Commission as providers of OVS. Section 76.1502 of the new rules requires the potential OVS provider in its Commission filing to give a "general description of the anticipated communities or areas to be served upon completion of the system." § 76.1502(c)(6). Because of the very short period of time provided to the Commission by law to approve such certification applications, this rule requires all comments or oppositions to certifications to be filed within five days of the Commission's receipt of the certification. § 76.1502(d).

16. There is no requirement, however, that the applicant provide any notice to these "communities" or "areas" that the applicant anticipates using the public rights-of-way in such areas for the provision of OVS services. If there is no requirement that notice be provided to municipalities contemporaneously with the filing with the Commission, such municipalities will be effectively foreclosed from filing any comments, favorable or otherwise, with the Commission. It is entirely probable that municipalities will have no notice at all of the LEC's intention to use public rights-of-way to provide OVS until the municipality, as a franchising authority, is served with a Notice of Intent under § 76.1503. The rules are not clear, however, as to when the Notice of Intent must be filed, and it is probable that such Notice will not be provided until after the Commission has approved the OVS certification under § 76.1502. Petitioners and their clients

have attempted to require the LEC operating within the municipality to provide contemporaneous notice to the municipality when the LEC requests certification from the Commission. In many cases, however, the LEC has refused to do so.

17. The problem of notice is easily rectified by a simple addition to § 76.1502, requiring the OVS operator to provide notice of filing with the municipality in which such OVS services will be offered.

THEREFORE, Petitioners respectfully request that the Commission:

1. Reconsider and clarify that existing LEC's seeking to provide cable television services through an OVS may be required, in their telecommunications franchise and as a part of their OVS services, to provide PEG access and payments in lieu of cable television franchise fees; and
2. Reconsider its Second Report and Order to include a new provision in § 76.1502 requiring notice to municipalities when an entity seeks certification to provide cable television service as an OVS.

Respectfully submitted,

**LLOYD, GOSSELINK, FOWLER,  
BLEVINS & MATHEWS, P.C**  
P.O. Box 1725  
Austin, Texas 78767  
(512) 322-5800  
FAX (512) 472-0532

By: \_\_\_\_\_

  
GEORGIA N. CRUMP

Texas State Bar No. 05185500

**ATTORNEYS FOR MUNICIPAL  
ADMINISTRATIVE SERVICES, INC. and  
DAVID M. GRIFFITH, AND ASSOCIATES**



**A**

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**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE WHEREBY THE CITY OF PLANO, TEXAS, AND GTE SOUTHWEST INCORPORATED AGREE THAT, FOR THE PURPOSE OF OPERATING ITS TELECOMMUNICATIONS BUSINESS, THE TELEPHONE COMPANY SHALL OCCUPY THE CITY STREETS, ALLEYS, HIGHWAYS, PUBLIC THOROUGHFARES, PUBLIC UTILITY EASEMENTS, AND PUBLIC WAYS OF THE CITY, IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, FOR THE PURPOSE OF MAINTAINING AND OPERATING ITS FACILITIES NEEDED AND NECESSARY TO PROVIDE SERVICE TO ITS CUSTOMERS IN PLANO, TEXAS; PRESCRIBING THE CONDITIONS GOVERNING THE USE OF PUBLIC RIGHTS-OF-WAY FOR THE TELEPHONE COMPANY'S TELECOMMUNICATIONS BUSINESS; PRESCRIBING THE ANNUAL COMPENSATION DUE THE CITY UNDER THIS ORDINANCE; PROVIDING AN INDEMNITY CLAUSE; SPECIFYING GOVERNING LAWS; PROVIDING FOR ASSIGNMENT; PROVIDING FOR A TERM; PROVIDING FOR FUTURE CONTINGENCIES; PROVIDING FOR A LIMITATIONS PERIOD; PROVIDING FOR CUMULATIVE EFFECT; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR METHOD OF ACCEPTANCE.**

WHEREAS, GTE Southwest Incorporated, hereinafter referred to as the Telephone Company, is now and has been engaged in the telecommunications business in the State of Texas and in furtherance thereof, has erected and maintained certain items of its physical plant in the City of Plano, Texas, hereinafter referred to as the City, pursuant to such rights as have been granted it by and under the laws of the State of Texas, and subject to the exercise of reasonable regulation under the police powers granted to the City; and

WHEREAS, the Telephone Company has operated its telecommunications business in the City under successive ordinances of the City, the last of which was Ordinance Number 67-8-3, adopted August 14, 1967; and

WHEREAS, it is to the mutual advantage of both the City and the Telephone Company that the Telephone Company continue operating in the City and in furtherance thereof that the Telephone Company continue to maintain and construct its physical plant in the public rights-of-way within the City's corporate limits in the future under the conditions established by the City; and

WHEREAS, this Ordinance is adopted by the City Council of the City of Plano pursuant to the provisions of Articles 1175, Section 2, V.A.C.S., Article 1446c, Section 21, V.A.C.S. and Article 10 of the Charter of the City of Plano;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF**

**PLANO, TEXAS, THAT:**

**SECTION 1.            PURPOSE**

Pursuant to the laws of the State of Texas, the City of Plano Charter and this Ordinance, GTE Southwest Incorporated has the non-exclusive right and privilege to use the public rights-of-way within the City of Plano, Texas for the operation of a telecommunications system subject to the restrictions set forth herein and to the lawful exercise of police power by the City as the City shall now or hereafter by Charter, Ordinance, or Resolution provide. The Telephone Company may use such rights-of-way only for such facilities for its telecommunications system. The terms of this Ordinance shall apply throughout the City, and to all operations of the Telephone Company within the City, and shall include all operations and facilities used in whole or in part in the provision of telecommunications services in any newly annexed areas upon the effective date of such annexation.

**SECTION 2.            ADDITIONAL AUTHORITY REQUIRED**

This Ordinance does not authorize the Telephone Company to provide cable television, video dialtone, or other video programming service in the City. To offer such services the Company must obtain an agreement from the City for that purpose as the law may require or provide. This section does not preclude the Telephone Company from providing its tariffed services to cable television companies.

**SECTION 3.            DEFINITIONS**

Whenever used in this Ordinance, the following words and terms shall have the

definitions and meanings provided in this section:

(a) FACILITIES: All Telephone Company duct spaces, manholes, poles, conduits, underground and overhead passageways, and other equipment, structures and appurtenances and all associated Transmission Media.

(b) TRANSMISSION MEDIA: All Telephone Company cables, fibers, wires or other physical devices used to transmit and/or receive communication signals, whether analog, digital or of other characteristics, and whether for voice or data or other purposes.

(c) RIGHTS-OF-WAY: All present and future public streets, avenues, highways, alleys, bridges, viaducts and public ways (excluding railroad rights-of-way) within the city limits of the City.

(d) CITY: The City of Plano, Texas.

(e) TELEPHONE COMPANY: GTE Southwest Incorporated.

(f) GOVERNED BY THE CITY or CITY GOVERNANCE: All ordinances, laws, rules, regulations, and charter provisions of the City now in force or that may hereafter be passed and adopted which are not inconsistent with this Ordinance.

(g) CLASS OF SERVICE: Those services provided for in the Telephone Company's approved tariff and included on the customer impact analysis report to be provided hereunder, as shown on Attachment B.

(h) TELECOMMUNICATION SYSTEM: All Telephone Company facilities and transmission media.

#### **SECTION 4.            SUPERVISION BY CITY OF LOCATION OF POLES AND CONDUITS**

(a) All poles to be placed shall be of sound material and reasonably straight, and shall be so set that they will not interfere with the flow of water to any gutter or drain, and so that the same will interfere as little as practicable with the ordinary travel on the street or sidewalk. In the placement and location of all such poles, Telephone Company shall comply with all pertinent requirements of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., and all regulations adopted thereunder. The location and route of all poles, stubs, guys, anchors, conduits and cables to be placed and constructed by the Telephone Company in the construction and maintenance of its telecommunications system in the City, and the location of all conduits to be laid by the Telephone Company within the limits of the City under this Ordinance, shall be subject to applicable City ordinances and regulations. Telephone Company shall give advance notice to the City of its intention to place poles, stubs, guys, and anchors, and shall include in such notification the location of all such installations.

(b) The Telephone Company is not authorized to license or lease to any person or entity the right to occupy or use the City's rights-of-way for the conduct of any private business. The Telephone Company may not allow any person or entity to attach any transmission media or other facilities to facilities owned by the Telephone Company unless such person or entity is properly authorized by the City to operate within the City; provided further, that if the Telephone Company permits any such authorized entity to attach its transmission or other media to Telephone Company's facilities, then the Telephone Company shall not discriminate among any such properly

authorized persons and entities, but shall permit all such entities requesting attachment to obtain the same on similar terms. However, nothing herein shall be construed to require the Telephone Company to permit any person or entity to attach any transmission media or other facilities to any of Telephone Company's facilities.

(c) Any such transmission media shall be so located on the facilities as to be safe and not to interfere unnecessarily with the use of the rights-of-way by others, including persons or entities authorized to use the facilities. The Telephone Company shall not be required to attach its transmission media to the facilities of any other person or entity or to permit the transmission media of any other person or entity to be attached to Telephone Company's facilities if it can be shown satisfactorily to the City that the Telephone Company will be subjected to increased risks of interruption of service or to increased liability for accidents, or if the facilities of such other person or entity are not of the character, design, and construction required by, or are not being maintained in accordance with industry standards or practice.

(d) In the placement of its Facilities, Telephone Company shall comply with all applicable federal, state, and local rules and regulations.

(e) All Facilities installed or relocated by Telephone Company along Type T, AA, A, B+, B, C, D, E, and F thoroughfares during the term of this Ordinance shall be located underground where technologically and economically feasible. Telephone Company agrees that all other Facility installations adjacent to other types of thoroughfares shall be placed underground if technologically and economically feasible. The determination of the technological and economic feasibility shall be made jointly

by the City and the Telephone Company. Each party agrees that it will consider all information regarding such feasibility that is presented.

**SECTION 5. ATTACHMENTS TO POLES AND SPACE IN DUCTS**

(a) The Telephone Company shall permit the City to use without charge, solely for its own non-commercial telecommunications purposes, one duct in all of Telephone Company's existing ducted facilities within the city limits, with sufficient space for necessary joints provided such duct space is available and, upon written request by the City, one additional duct in Telephone Company's underground conduit facilities if such additional duct space is available. Also, Telephone Company shall provide adequate space on all non-ducted facilities now existing or hereafter constructed on or within the rights-of-way for the City to attach transmission media for the City's own non-commercial use. Where insufficient facilities exist to accommodate the City, other existing facilities may be substituted therefor with the concurrence of the City.

(b) If the Telephone Company shall hereafter extend its existing underground conduits, it shall provide one duct in each additional conduit for the City's own non-commercial purposes, as provided above. The Telephone Company shall cooperate with the City at all times by providing timely, complete and continuous information regarding the location of all conduit, along with such maps, plats, construction documents and drawings as may exist or be created from time to time. The City shall not use any facilities which are provided for City's use by the Telephone Company for power transmission purposes, nor use any circuits in such conduits or upon such poles



to carry voltage in excess of one hundred and thirty (130) volts for signal purposes, nor otherwise use any such circuits so as to unreasonably interfere with telecommunications or facilities; provided, that Telephone Company shall not use high potential wires for power transmission in its facilities, nor otherwise use the same so as to unreasonably interfere with the operation of the City's communications or facilities. Telephone Company and City shall cooperate and coordinate their efforts to make the most efficient and economical use of facilities. To this end, the parties will make periodic assessments of their needs, including, but not limited to, use of facilities and exchange of same to meet requirements. The City shall keep Telephone Company aware of its telephone facility requirements and shall notify Telephone Company in writing prior to using Telephone Company facilities.

(c) City shall not sell, lease or otherwise make available its rights to use Telephone Company's facilities to any third party. Such rights are provided solely for the non-commercial exclusive use by the City. However, this restriction shall not prevent the City from using the services of a third party commercial entity to manage or operate the City's facilities on behalf of the City so long as no resale or other commercial use of such facilities shall occur and so long as the third party employed by City is bound by the pertinent provisions of this Ordinance.

(d) Should the City desire to purchase or otherwise acquire facilities from the Telephone Company for its non-commercial use, then a further separate, non-contingent agreement shall be a prerequisite to such purchase or acquisition.

## **SECTION 6.            CONSTRUCTION, MAINTENANCE AND EXCAVATION**

(a) All work performed by Telephone Company within any rights-of-way in the City shall be in accordance with the City of Plano Manual for Utility Location and Coordination, Ordinance No. 87-12-21.

(b) The City shall have the power at any time to order and require the Telephone Company to remove any of its facilities that are dangerous to life or property, and in case the Telephone Company, after notice, fails or refuses to act, then the City, at the direction of the City Engineer, shall have the power to remove or abate the same at the expense of the Telephone Company, all without compensation or liability for damages to the Telephone Company for damages to its facilities unless proximately caused by the City's gross negligence.

(c) The surface, base, and landscape treatment of any public right-of-way disturbed by the Telephone Company in the construction or maintenance of its telecommunications system shall be restored in accordance with existing standards of the City in effect at the time of the work. Should the City determine, within two years from the date of such restoration, that such surface, base, or landscape treatment requires additional restoration work to meet existing standards of the City, the Telephone Company shall perform such additional restoration work at its expense to the reasonable satisfaction of the City.

(d) Engineering plans for projects involving new buried cable and underground conduit systems to be placed in rights-of-way shall be submitted to the City Engineer for review and approval prior to construction.

(e) Except in an emergency, the Telephone Company shall not excavate any right-of-way without first notifying the City, and, if approval is required, it shall be given if the proposed excavation is in compliance with the requirements of City governance. The City shall be notified as soon as practicable regarding work performed under emergency conditions, and the Telephone Company shall restore such rights-of-way as provided in Section 6(c).

**SECTION 7.           USE OF RIGHTS-OF-WAY BY OTHERS; RELOCATION OF FACILITIES**

(a) The City reserves the right to lay, and permit to be laid, sewer, gas, water, electric, and other pipelines or cables or conduits, including telecommunications and cable television lines, and to do and permit to be done any underground and overhead installation or improvement that may be deemed necessary or proper by the governing body of the City in, across, along, over or under any street, alley, highway, public thoroughfare, public utility easement or public way occupied by the Telephone Company, and to change any curb or sidewalk or the grade of any street. In permitting such work to be done, the City shall not be liable to the Telephone Company for any damages related to such work, nor, in the event governmental immunity does not exist, shall the City be liable to the Telephone Company for any damages not proximately caused by the City's sole negligence; however, nothing herein shall relieve any other person or entity from liability for damages to facilities of the Telephone Company.

(b) The City expressly reserves the right to change the grade, install, relocate, or widen the public streets, sidewalks, bikeways, alleys, public thoroughfares, highways, landscaping, and public ways and places within the present limits of the City and within said limits as same may from time to time be extended, and the Telephone Company shall relocate or place underground, at its own expense, its poles, wires, cables, anchors, manholes, conduits, and other facilities and appurtenances in order to accommodate the installation, relocation, widening, or changing of the grade of any such public street, sidewalk, bikeway, alley, public thoroughfare, highway or public way, including if necessary relocating such poles, wires, cables, anchors, manholes, conduits, or other facilities or appurtenances to a sufficient distance from the edge of the pavement to permit a reasonable work area for machinery and individuals engaged in installing, relocating, widening, or changing the grade of any public street, sidewalk, bikeway, alley, public thoroughfare, highway or public way.

(c) The City also herein reserves the right to require the Telephone Company to relocate or to place underground, at the sole expense of the Telephone Company, any facilities erected or maintained pursuant to the privilege granted herein, if said relocation or burial is deemed necessary by the governing body or its designated representative for traffic safety purposes or the accommodation of other necessary utilities owned and/or operated by the City for public service, including traffic signals.

(d) Whenever by reason of changes in the grade of a thoroughfare or in the location or manner of constructing a water pipe, gas pipe, sewer, or other aboveground or underground structure, it is deemed necessary by the City to remove,

alter, change, adapt, or conform the underground or aboveground facilities of the Telephone Company, the Telephone Company shall make the alterations as soon as practicable when ordered in writing by the City, without claim for reimbursement or damages against the City.

(e) For public improvement projects where the parties have agreed on a schedule, if after notification that facility relocation is required, the Telephone Company has not, prior to the date specified by the City, relocated its affected facilities within the rights-of-way, and when such delays are not caused by actions of the City, the following procedure will be followed. The City shall provide the Telephone Company with written notice advising the Telephone Company of the City's intent to effect the relocation of the affected facilities unless the Telephone Company relocates the affected facilities by a specified date, no sooner than five (5) days after receipt by Telephone Company of such written notice. If, after expiration of the written notice required by the preceding sentence, the Telephone Company continues to delay, the City shall have the right to effect relocation of the affected facilities and the Telephone Company shall reimburse the City for all costs of such relocation. Reimbursement shall be made within thirty days of receipt of invoice. The City shall not be liable to the Telephone Company for any damage to such facilities unless proximately caused by the City's gross negligence, and shall not be liable in any event for any consequential damages relating to service interruptions. Such relocation by the City will be performed only when the City Engineer determines that it is necessary to prevent disruption of a City project. Such relocation shall be accomplished by

means of temporary construction and in a manner which will not unreasonably disrupt telecommunications services. The City shall coordinate with the Telephone Company prior to such necessary relocations and will not attempt to relocate such facilities until the City has exhausted the foregoing procedures. The Telephone Company shall ultimately be responsible for the final permanent relocation of the Telephone Company's facilities.

#### **SECTION 8.            TEMPORARY REMOVAL OF AERIAL WIRES**

The Telephone Company on the request of any person shall remove or raise or lower its wires within the City temporarily to permit the moving of houses or other bulky structures. The expense of such temporary removal, raising or lowering of wires shall be paid by the benefitted party or parties, excluding the City, and the Telephone Company may require such payment in advance. The Telephone Company shall be given not less than forty-eight (48) hours advance notice to arrange for such temporary wire changes. The clearance of wires above ground shall conform to the basic standards of the National Electrical Safety Code, National Bureau of Standards, United States Department of Commerce, as promulgated at the time of erection thereof.

#### **SECTION 9.            TREE TRIMMING**

In the pursuit of maintaining its telecommunications system, the Telephone Company, its contractors, agents, successors and assigns shall have the right to trim trees in the right-of-way so as to prevent the branches of such trees from coming in

contact with the wires, cables or other facilities of the Telephone Company and in a manner such that the aesthetics and health of the trees are not destroyed. When so ordered by the City, said trimming shall be done under the supervision and direction of the City Council or of any City official to whom said duties have been or may be delegated.

#### **SECTION 10.        INDEMNIFICATION**

(a) The Telephone Company shall indemnify and hold the City harmless against all claims, causes of action, costs, expenses (including reasonable attorney fees) and damages to persons or property, to the extent proximately caused by the negligence or willful misconduct of Telephone Company's officers, employees or agents arising directly or indirectly out of the construction, maintenance and operation of the Telephone Company's facilities which are subject to this Ordinance. This duty to indemnify only applies where, and to the extent, the Telephone Company's negligence or willful misconduct is either the sole or a contributing cause of the injury, death or damage. It does not extend to any portion of any injury, death or damage caused by either the sole or contributing negligence or intentional act or omission of the City or any third party under the control of the City. This provision is not intended to create liability for the benefit of third parties but is solely for the benefit of the Telephone Company and the City.

(b) Procedures for Indemnification. City shall give written notice to Telephone Company within ten (10) days of receipt by City of any claim against City which might give rise to a claim based on the indemnity provided herein, stating the nature and

basis of the claim and the amount thereof. The City Attorney and Telephone Company's General Counsel shall then promptly communicate and decide whether the provisions of this Section apply to the particular claim. City shall have the sole right and authority to determine the disposition of any action, suit, claim or proceeding brought against it, provided that City in exercising its rights and discharging its obligation under this indemnity, shall at all times act in good faith and shall settle, compromise or dispose of such actions, suits, claims or proceedings as if it were ultimately liable with respect thereto. However, in the event any action, suit or proceeding is brought with respect to which Telephone Company may have liability under the indemnity provided herein, Telephone Company shall have the right, without prejudice to City's rights hereunder, at its sole expense, to be represented by counsel of its own choosing and with whom counsel for City shall confer in connection with the defense of any action, suit or proceeding. In such a case, each party shall make available to the other party, and its counsels and accountants, all books and records of such party relating to such action, suit or proceeding and the parties agree to render to each other such assistance as may reasonably be requested in order to insure the proper and adequate defense of any such action, suit or proceeding. The cooperation, communication and assistance described here shall be coordinated through the offices of the City Attorney and the Telephone Company's General Counsel.

(c) Selection of Counsel. In the event Telephone Company may be obligated under this Section to indemnify City, Telephone Company shall be entitled to assume the defense of such action, suit, claim or proceeding upon the delivery to City of



written notice of its election so to do. After delivery of such notice, the Telephone Company shall not be liable to City under this Ordinance for any fees of counsel subsequently incurred by City with respect to the same proceeding, provided that (i) City shall have the right to employ its own counsel in any such proceeding at the City's own expense; and (ii) if (A) the employment of counsel by City has been previously authorized by the Telephone Company, (B) City shall have reasonably concluded that there may be a conflict of interest between the Telephone Company and City in the conduct of any such defense, or (C) the Telephone Company shall not, in fact, have employed counsel to assume the defense of such proceeding, then the fees and expenses of City's counsel shall be borne by Telephone Company.

#### **SECTION 11.      TERM**

(a) This Ordinance shall be in full force and effect for the period beginning with the effective date hereof and ending fifteen (15) years after such date; provided that at the expiration of the seventh and eleventh anniversaries of this Ordinance, either party may request in writing that a new agreement be negotiated and if said new agreement is not successfully concluded within a period of six (6) months from the date of the written request, this agreement may be submitted for mediation at the request of either party, in accordance with paragraph (b) of this section. The issues that may be submitted for mediation at such time shall include, but are not limited to, the value of the use of the City's public rights-of-way. If a new agreement is not successfully concluded through the mediation process within a period of six (6) months from initiation of the process, the Mediator may be directed by either party to